No. 111 Original

(11)

MOTION FILED
APR 20 1988

In The

Supreme Court of the United States

October Term, 1988

STATE OF DELAWARE,

Plaintiff

STATE OF TEXAS,

Plaintiff-Intervenor

STATE OF ARIZONA,

Plaintiff in Intervention

v.

STATE OF NEW YORK,

Defendant

MOTION OF THE STATE OF ARIZONA FOR LEAVE TO FILE COMPLAINT IN INTERVENTION; COMPLAINT IN INTERVENTION

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MOTION OF THE STATE OF ARIZONA FOR LEAVE TO INTERVENE

Pursuant to Rule 9 of the Rules of the Supreme Court, the State of Arizona, a sovereign state of the United States of America, by and through Attorney General Robert K. Corbin, moves the Court for an order permitting it to intervene in the above-entitled cause, and permitting its proposed Complaint in Intervention, attached hereto, to be filed in this action. To the extent appropriate, the Brief in Support of Motion for Leave to File heretofore filed by the State of Texas, Plaintiff-Intervenor, is relied upon by the State of Arizona to support this motion. In support of this motion, the State of Arizona would show the Court as follows:

I.

1. On or about May 31, 1988, the Court granted the Motion of Plaintiff State of Delaware ("Delaware") for leave to file a complaint invoking the original jurisdiction of the Court to resolve a controversy between Delaware and Defendant State of New York ("New York") as to which state is entitled to claim and take possession of certain unclaimed intangible personal property, consisting of moneys and other intangible property ("Excess Receipts"),[1] held or formerly held by securities brokerage houses incorporated in Delaware and demanded by or remitted to New York.

2. On December 12, 1988, Thomas Jackson, Esquire, was appointed Special Master in this case.

3. On or about February 21, 1989, the Court granted the Motion of Plaintiff in Intervention State of Texas ("Texas") to intervene and file its Complaint in Intervention in this case.

4. As set forth in detail in its Complaint, Texas claims a portion of the Excess Receipts which constitute the subject matter of the original controversy between Delaware and New York, specifically, that portion of Excess Receipts held or formerly held by securities brokerage houses incorporated in Delaware which are attributable to Issuers incorporated in Texas.

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[1] In its Complaint in Intervention, Texas has defined certain terms. Arizona utilizes those definitions herein.

5. Texas also claims the right to take custodial possession of certain additional excess receipts, consisting of excess receipts attributable to Issuers incorporated in Texas held or formerly held by the Depository Trust Company and excess receipts which have arisen in connection with Distributions made by Texas municipal and other governmental Issuers ("Additional Excess Receipts") which are now being demanded by or remitted to New York. It is the understanding of the State of Arizona ("Arizona") that the Court intends to consider claims to both the Excess Receipts originally at issue and the Additional Excess Receipts identified by Texas.

6. Texas claims a portion of the Excess Receipts and the Additional Excess Receipts for the reason that they constitute a debt owed by the Issuer to the securities' Beneficial Owner. If the identity of the Beneficial Owner is unknown, the Excess Receipts and Additional Excess Receipts should be remitted to the state of incorporation of the Issuer under the state's unclaimed property law.

7. Arizona claims a portion of the Excess Receipts and Additional Excess Receipts at issue in this action, specifically, that portion of the Excess Receipts and Additional Excess Receipts attributable to Issuers incorporated in the State of Arizona and that portion attributable to Arizona municipalities and other governmental entities.

8. The amount of Excess Receipts and Additional Excess Receipts that Arizona is entitled to claim is presently unknown. Arizona has never, prior to this lawsuit, had any reason to identify and quantify such Excess Receipts and Additional Excess Receipts. However, it is probable that at least one Issuer incorporated in Arizona

has generated Excess Receipts and Additional Excess Receipts. Moreover, it is a virtual certainty that bonds issued by Arizona municipalities and other governmental entities have generated Additional Excess Receipts subject to the claim of Arizona.

9. Arizona asserts its claim pursuant to the rule in *Texas v. New Jersey*, 379 U.S. 674 (1965) and the Arizona Revised Statutes § 44-301 *et seq.*, which provides, in essence, for the custodial taking of unclaimed intangible personal property when the existence and location of the owner of the property is unknown to the holder of the property, and no claim to said property has bee ı asserted within the applicable dormancy period, which for most types of personal property is seven years.

10. Arizona supports Texas' Complaint in Intervention and adopts Texas' Brief in Support of Motion for Leave to File, and the factual and legal arguments set forth therein, to the extent that the same are applicable and relevant to the claims of Arizona set forth in Paragraph 7 above.

11. It is essential that Arizona be permitted to intervene in its own right in this proceeding. The decision of the Court will establish a rule of law which will conclusively determine the future right of Arizona to claim and take possession of unclaimed property similar or identical in nature to the Excess Receipts and Additional Excess Receipts at issue herein. Additionally, if Arizona is to establish its claim and right to take custodial possession of a portion of the property presently at issue, it must have access to the discovery process in order to identify those Excess Receipts and Additional Excess

Receipts attributable to Issuers incorporated in Arizona. As a party, Arizona can obtain a ruling from the Court recognizing its right to take possession of specific unclaimed property pursuant to its unclaimed property law and ordering New York to tender such property to Arizona.

12. Based on the foregoing, Arizona is entitled to intervene as a matter of right pursuant to Rule 24(a)(2), Federal Rules of Civil Procedure. Alternatively, Arizona urges the Court to exercise its discretion and grant the requested intervention pursuant to Rule 24(b), Federal Rules of Civil Procedure.

13. The intervention of Arizona in this action will not unduly delay these proceedings or prejudice the adjudication of the rights of the present parties. To the extent that it can do so, Texas has offered to serve as lead counsel for those states, including Arizona, wishing to intervene and represent themselves in this case. The addition of Arizona as a Plaintiff in Intervention will not result, therefore, in an unmanageable increase in the number of parties to this litigation.

14. The Court, in *Western Union Telegraph Company v. Pennsylvania*, 368 U.S. 71 (1961), recognized the difficulties inherent in resolving controversies between different states over their respective rights to claim and take possession of unclaimed intangible personal property, and concluded that the United States Supreme Court was the appropriate forum in which "all the states that want to do so can present their claims for consideration and final, authoritative determination." *Id.* at 79. See, also, *Pennsylvania v. New York*, 407 U.S. 206 (1972). It is such an

opportunity to present its claim that Arizona seeks by urging this Court to grant leave to intervene herein.

Wherefore, Arizona prays that it be permitted to intervene as a party plaintiff in this case in order to assert the claims set forth in the attached Complaint in Intervention and to adopt as its own Texas' Brief in Support of the Motion for Leave to File as well as the factual and legal arguments asserted by Texas to the extent the same are relevant and applicable to the claims of Arizona.

Respectfully submitted,

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STATE OF TEXAS,

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STATE OF ARIZONA,

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v.

STATE OF NEW YORK,

Defendant

COMPLAINT IN INTERVENTION

The State of Arizona, ("Arizona") Plaintiff in Intervention, by Robert K. Corbin, its Attorney General, with leave of the Court first had, files this Complaint in Intervention in the above styled and numbered cause, and complains and alleges as follows:

I.

JURISDICTION

1. The original jurisdiction of this Court is invoked under Article III, Section 2 of the Constitution of the United States and Section 1251 of Title 28 of the United States Code.

II.

PENDING ACTION

2. On or about May 31, 1988, this Court granted the motion of Plaintiff State of Delaware ("Delaware") for leave to file a complaint invoking the original jurisdiction of the Court to resolve a controversy between Delaware and Defendant State of New York ("New York") as to which state is entitled to claim and take possession of certain unclaimed moneys and other intangible property held by securities brokerage firms incorporated in Delaware.

3. On December 12, 1988, Thomas Jackson, Esquire, was appointed Special Master to hear this case.

4. On or about February 21, 1989 The Court granted the Motion of Plaintiff in Intervention State of Texas ("Texas") to intervene and file its Complaint in Intervention in this case.

III.

INTEREST AND CLAIM OF ARIZONA AS PLAINTIFF IN INTERVENTION

5. Plaintiff in Intervention, the State of Arizona, acts by and through the Attorney General of Arizona, the official of the State of Arizona charged with the duty under the Constitution and the laws of the State of prosecuting unclaimed property suits at the request of the Arizona Department of Revenue and of representing the State of Arizona in litigation generally.

6. At present, this litigation involves a dispute as to which state is entitled to the custodial taking of certain unclaimed, intangible personal property ("Excess Receipts"), which comes into being and acquires its character as unclaimed property in the context of securities transactions. The Excess Receipts consist of unclaimed payments of dividends, profits, principal, interest, and securities representing any of the foregoing ("Distributions"), held or formerly held by brokerage firms incorporated in the State of Delaware. The Excess Receipts are Distributions received by these brokerage firms for the benefit of their customers which exceed the amounts to which the brokerage firms are entitled. The Excess Receipts are usually maintained in a "Suspense Account" until expiration of the applicable dormancy period, after which time, under current practice, they are remitted to New York.

7. Arizona claims a portion of the Excess Receipts. Additionally, Arizona seeks to have this Court consider and determine rights to certain additional Excess Receipts ("Additional Excess Receipts") which are not yet part of this litigation which involves the same issues. These Additional Excess Receipts consist of: (a) excess receipts presently being remitted to New York which are held by the Depository Trust Company ("DTC"), a national clearinghouse for the settlement of trades in corporate and municipal securities; and (b) excess receipts arising from unclaimed principal and interest payments on municipal and state bonds which have never been remitted to any state. Additional Excess Receipts are of the same character and come into existence in the same manner as the Excess

Receipts at issue in the principal case and will necessarily be controlled by the Court's ruling in this case.

8. Arizona is entitled to a portion of the Excess Receipts at issue in this litigation (and to a portion of the Additional Excess Receipts it seeks to have the Court consider) because they constitute a debt of the entity ("Issuer") initially issuing the shares of stock, bonds, debentures or other securities instruments owed to the entity or individual ("Beneficial Owner") who has the economic rights to the security, including the entitlement to Distributions.

9. If the identity and location of the Beneficial Owner is unknown, the state of incorporation of the Issuer should be entitled to collect the Excess Receipts under that state's unclaimed property law. Under existing law and practice, a debt of identical character is remitted to the Issuer's state of incorporation when held by the Issuer's Paying Agent (defined in part IV) so it should be similarly remitted to the state of incorporation of the Issuer when held by other agents in the securities holding, transfer, and distribution system ("Distribution System"). Distributions generated by Issuers incorporated in the State of Arizona and those generated by Arizona municipalities which are unclaimed and whose Beneficial Owner is unknown, should be returned to the State of Arizona. The claim of Plaintiff in Intervention is based upon the practical reality of the manner in which securities are traded and Distributions are paid, and relies upon a strict interpretation of this Court's holding in *Texas v. New Jersey*, 379 U.S. 674 (1965).

10. By this action, Arizona seeks a judgment that New York pay to Arizona all Excess Receipts and Additional Excess Receipts attributable to Issuers incorporated in the State of Arizona and those that are attributable to Arizona municipalities. Arizona further seeks a declaration that Arizona has the right in the future to claim and take possession of Excess Receipts and Additional Excess Receipts without interference from any other state. Arizona additionally seeks an order from this Court enjoining and restraining New York from demanding or collecting such Excess Receipts and Additional Excess Receipts, and from expending any such sums collected, but presently unspent, which are attributable to Issuers incorporated in the State of Arizona and to Arizona municipalities, until such time as this controversy is resolved.

11. Arizona asserts its claim pursuant to Title 44, Chapter 3, Article 1 of the Arizona Revised Statutes, Sections 44-301 to 44-340 (Arizona Uniform Unclaimed Property Act) which provides, in essence, for the custodial taking of abandoned or unclaimed intangible personal property when the existence and location of the owner of the property is unknown to the holder of the property, and no claim to said property has been asserted within the applicable dormancy period, which for most types of intangible property is seven years.

IV.

CLAIMS OF DELAWARE AND NEW YORK

12. Delaware and New York each argue that their respective claims to the Excess Receipts are supported by the rulings of this Court in *Texas v. New Jersey, supra,* and *Pennsylvania v. New York,* 407 U.S. 206 (1972). These cases establish the principle that unclaimed property is subject to being remitted to the state of the last known address of its owner. If that address is unknown, the property is to be remitted to the state of incorporation of the debtor.

13. Delaware asserts the right to claim the Excess Receipts at issue herein on the basis that the identity of said property's Beneficial Owner, whom Delaware equates with a creditor, is unknown. Therefore, the Excess Receipts should be remitted to Delaware as the state of incorporation of the brokerage firm holding such funds, which is characterized by Delaware as the debtor.

14. New York, on the other hand, argues that the property's Beneficial Owner is always paid the Distributions to which he is entitled. The Beneficial Owner therefore has no claim to the Excess Receipts and his identity is irrelevant to the analysis of rights at issue herein. Instead, contends New York, the last known address of the brokerage firms that were underpaid, characterized by New York as the "creditor" firms, determines to which state the overpayments held by the "debtor" firms should be paid. Since most such brokerage firms have New York trading addresses, New York is entitled to claim the Excess Receipts.

15. The arguments of both Delaware and New York are based upon narrow technical and legalistic analyses of a complex Distribution System. Both Delaware's designation of the brokerage firms as "debtors", and New York's classification of the "underpaid" brokerage firms as "creditors", fail to properly characterize the relationships of the various parties to ownership and Distribution transactions of the present Distribution system. In this Distribution System, at least two Intermediaries are *always* involved in the routine processing of ownership trades and moving Distributions between the Issuer and the ultimate Beneficial Owner/Customer. Delaware is basically contending that the state of incorporation of the *last* Intermediary, the brokerage firm holding the Excess Receipts, determines the state to which all the unclaimed property is to be remitted. New York contends that all Excess Receipts should be remitted to New York for the reason that the principal business offices and headquarters of most of the Intermediary brokerage firms are located in the New York City area. Under either argument, the place of incorporation of mere Intermediaries, who act simply as transfer agents and who themselves as a rule make no claim to the Distributions, will determine which state can claim and take possession of hundreds of millions of dollars. As a practical matter under either states' theory, only two states would be legally authorized to claim the great bulk of these moneys.

V.

CLAIM OF ARIZONA

16. In both *Texas v. New Jersey, supra,* and *Pennsylvania v. New York, supra,* the Court made clear its commitment to resolving unclaimed property controversies in a manner that is both equitable and easy to administer. In *Texas v. New Jersey, supra,* Mr. Justice Black adopted a rule that "involves a factual issue simple and easy to resolve and leaves no legal issue to be decided" and that "will tend to distribute escheats among the states in the proportion to the commercial activities of their residents." The rule was clear under these legal principles that when a Paying Agent could not find a last known address for the Record Owner, unclaimed dividends should be remitted to the state of incorporation of the Issuer. The same principle should be adopted in this litigation since the addition of more Intermediaries to the chain of distribution should not affect the entitlement of states to the Excess Receipts. This would also return these moneys to the states prorata according to each state's commercial activity, and would mitigate the harshness of the "winner take all" positions espoused by both Delaware and New York. This is the resolution urged by Arizona as a Plaintiff in Intervention. It is also the resolution urged by Texas as a Plaintiff-Intervenor.

17. The declaration of a dividend or principal and interest payments basically represents a debt between the Issuer and the Beneficial Owner. The Beneficial Owner is in fact the creditor and and the Issuer the debtor. All of these Excess Receipts are simple accounting errors occurring on at least three (3) different sets of books and

records. All Excess Receipts arise in the context of the chain of transactions between the debtor-Issuer and creditor-Beneficial Owner, and if the existence and location of the Beneficial Owner, is unknown, the Excess Receipts, pursuant to *Texas v. New Jersey, supra*, should be remitted to the state of incorporation of the Issuer.

VI.

ADDITIONAL EXCESS RECEIPTS

18. In addition to claiming a portion of the Excess Receipts held or formerly held by the brokerage firms and demanded by or remitted to New York, Arizona asserts a claim to certain Additional Excess Receipts demanded by or remitted to the State of New York which is not presently at issue in this case, but which should be considered by the Court. The property consists of those Additional Excess Receipts held by DTC or its Nominee, Cede & Co. It also consists of Additional Excess Receipts which have arisen in connection with Distributions made by Governmental Issuers, which property is only now being demanded by New York pursuant to a recent statutory amendment.

19. Arizona as a Plaintiff in Intervention believes that the amount of such Additional Excess Receipts greatly exceeds the amount of Excess Receipts presently in controversy.

20. As evidenced by its 1987 Annual Report, DTC holds huge amounts of Additional Excess Receipts. These

Additional Excess Receipts come into existence and acquire their character as unclaimed property in the same basic manner as the Excess Receipts held by DTC Participants.

21. Arizona claims the Additional Excess Receipts identified above and all Additional Excess Receipts held by DTC attributable to Issuers incorporated in the State of Arizona. This claim is made for the same reason and on the same basis that Arizona claims a portion of the funds already at issue in this litigation.

22. When Book Entry Certificates are issued DTC is in direct contractual relationship with the Issuer and functions as the Issuer's Paying Agent and registrar. Thus, without regard to other claims, DTC is responsible as a Paying Agent under *Texas v. New Jersey, supra*. Paying Agents presently remit owner unknown distributions to the state of incorporation.

23. The second type of Additional Excess Receipts results from bonds or debentures issued by Governmental or corporate Issuers. When the Issuer is a governmental entity, Distributions always arise in connection with municipal bonds issued to finance local governmental projects, and consist of principal and interest payments. They have never been reported or remitted to any state. They are now being demanded by New York. Pursuant to amendments to Section 300 of New York's Abandoned Property Law, which became effective April 21, 1987, distributions attributable to Governmental Issuers held on or after July 1, 1984, are now being demanded by

New York if they have not been claimed at the expiration of three years.

24. DTC and DTC Participants have never reported or remitted to any state these Additional Excess Receipts; instead, they have been lying fallow at DTC and at each and every DTC Participant. Until now, there has been no vehicle by which any state could claim and take possession of these Additional Excess Receipts paid into the Distribution System by each of the states' cities, counties and school districts.

25. Arizona claims the right to take possession of Additional Excess Receipts held by DTC and all DTC Participants attributable to Governmental Issuers. With respect to the Additional Excess Receipts held by the DTC Participants, Arizona claims that property for the same reason and on the same basis that it claims a portion of the funds already at issue in this litigation.

26. While the amount of its claim to Additional Excess Receipts held by DTC and any DTC Participants attributable to Arizona Governmental Issuers is presently unknown, Arizona estimates that amount may well be in the millions of dollars.

27. Arizona urges the Court to consider and determine the rights to claim the potentially huge amounts of Additional Excess Receipts described above. The decision of this Court with respect to the Excess Receipts already before it will conclusively and finally determine the rights of all states to take custodial possession of such Additional Excess Receipts. Such a final determination of rights should not be made without the Court's having

first considered arguments which are relevant and peculiar to the Additional Excess Receipts. Inclusion of the Additional Excess Receipts will not broaden the issues or unduly complicate the pending litigation.

28. The Additional Excess Receipts were not initially made part of this litigation because neither Delaware nor New York had any incentive to include them. DTC is incorporated in the State of New York. All Additional Excess Receipts held by DTC would therefore be remitted to New York and all Excess Receipts held by DTC Participants would go to Delaware, under the theory urged in this litigation by Delaware. Under New York's theory of this litigation, New York would take all Additional Excess Receipts and Excess Receipts from both DTC and DTC Participants. By amending its statute, New York has also poised itself to seize all Additional Excess Receipts existing in the form of municipal bond Distributions.

VII.

MERITS OF CLAIM ASSERTED AND RESOLUTION URGED BY PLAINTIFF IN INTERVENTION ARIZONA

29. In *Texas v. New Jersey, supra,* and *Pennsylvania v. New York, supra,* the Court made clear its commitment to resolving unclaimed property controversies in a manner that is both easy to administer and equitable. The resolution urged by Arizona satisfies both criteria and is the same resolution urged by Texas. It is easy to administer, since the identity of the Issuer is always easily determined. Indeed, the identity of the Issuer is consistently

known and reflected on all sets of books and records of all parties to the securities transactions. Moreover, all DTC Participants have regional or branch offices located in every state. These branch offices already maintain a separate set of books and records for local Customers evidencing their local Customers' ownership interests and Distribution receipts. Each branch/regional office also maintains its own bank account, and is individually accountable for year-end profit and loss statements to its New York headquarters. Presently, each branch office also maintains its own "Suspense Accounts" for unclaimed Distributions. These unclaimed funds are returned to their New York headquarters and are then remitted by the DTC Participant to New York. Thus transaction records already exist on a state-by-state basis.

30. The resolution proposed by Texas and Arizona is also by far the most equitable method of distributing the unclaimed property at issue in this lawsuit. This is particularly true with respect to the Additional Excess Receipts consisting of municipal bond Distributions. It is inequitable that moneys held by DTC Participants attributable to the State of Arizona and its political subdivisions might be remitted to New York, or any state, other than the State of Arizona. It is also particularly egregious that the Additional Excess Receipts held by DTC, which clearly functions merely as a Paying Agent or registrar in these transaction, are being demanded by and will be, without this Court's intervention, remitted to New York.

31. The Excess Receipts and Additional Excess Receipts claimed herein constitute unclaimed property

arising from an unsuccessful attempt to pay a debt of the Issuer initially issuing the shares of stock, bonds, debentures and other securities instruments owed to the Beneficial Owner. Excess Receipts constitute property which is unclaimed by the Beneficial Owner. To determine the rights of various states to claim such Excess Receipts on the basis of the arguments urged by either Delaware or New York is contrary to legal precedent and unfair.

WHEREFORE, Plaintiff in Intervention State of Arizona prays:

1. That Arizona be allowed to intervene herein;

2. That Additional Excess Receipts held by the Depository Trust Company and demanded by or remitted to New York be included as part of the unclaimed property in controversy in this lawsuit;

3. That Additional Excess Receipts attributable to Governmental Issuers held by the Depository Trust Company and all DTC Participants be included as part of the unclaimed property in controversy in this lawsuit;

4. That the temporary injunction sought by Delaware with respect to the Excess Receipts already at issue herein be extended, for the reasons stated in the Complaint of Delaware, to restrain New York from demanding or taking possession of all Excess Receipts attributable to

Issuers incorporated in the State of Arizona or the Arizona Governmental Issuers;

5. That Defendant New York be restrained and enjoined from collecting any Excess Receipts and Additional Excess Receipts attributable to Issuers incorporated in the State of Arizona or attributable to Arizona Governmental Issuers, and from expending any sums collected but presently unspent, consisting of such Excess Receipts and Additional Excess Receipts, until such time as this controversy is resolved;

6. That judgment be entered that the Excess Receipts and Additional Excess Receipts held by DTC and DTC Participants attributable to Issuers incorporated in the State of Arizona or to Arizona Governmental Issuers is subject only to the claims of the State of Arizona under the Arizona Uniform Unclaimed Property Act;

7. That New York be directed to pay or deliver to Arizona all of the Excess Receipts and Additional Excess Receipts paid or delivered to New York attributable to Issuers incorporated in the State of Arizona and Arizona Governmental Issuers which have been abandoned for the applicable dormancy period under the Arizona Uniform Unclaimed Property Act;

8. That the State of Arizona be granted such other and further relief as this Court deems just.

Respectfully submitted,

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